

UNITED STATES DISTRICT COURT

DISTRICT OF NEW HAMPSHIRE

Markem Corporation,  
Plaintiff

v.

Civil No. 07-cv-6-SM

Zipher Ltd., and  
Videojet Technologies, Inc.,  
Defendants

O R D E R

Canon 3D of the Code of Conduct for United States Judges provides (with exceptions not pertinent to this case) that when a judge is disqualified in a proceeding because "the judge's impartiality might reasonably be questioned," the judge may participate in the proceeding if all the parties and lawyers, after notice of the basis for the disqualification, agree in writing to waive the disqualification under a procedure independent of the judge's participation.

Unless a waiver is obtained from all parties and all counsel, Chief Judge McAuliffe intends to disqualify himself in this case, continue the Markman hearing, and have the case reassigned to a different judge because of the following circumstances:

The court (Deputy Clerk Barrett) was advised that Carl Rowold, Esq., is employed as corporate patent counsel by a

company that owns one of the parties to this litigation, and he is at least indirectly involved in a supervisory capacity. Attorney Rowold is a close personal friend of Chief Judge McAuliffe, and has been for some 37 years. Chief Judge McAuliffe stood in as a proxy godfather of Attorney Rowold's eldest son. Although personal contact between the judge and Attorney Rowold over the years has not been frequent, and they have lived in geographically distant regions of the country, still, the judge considers the friendship among his closest, and believes the parties must be made aware of that fact in order to be fully informed of the pertinent circumstances. Attorney Rowold is apparently planning to attend the Markman hearing scheduled this week as an observer, and the judge will, in that event, entertain Attorney Rowold socially.

Given these circumstances, the Chief Judge deems it possible that a reasonable person, fully informed of these facts, might reasonably question the judge's impartiality, or, these circumstances might suggest an appearance of partiality. See, e.g., 28 U.S.C. § 455; Canon 3D, Code of Conduct for United States Judges.

Chief Judge McAuliffe is fully satisfied of his actual impartiality in this matter and would not recuse *sua sponte*. Nevertheless, as the parties may have plausible and legitimate differing views, the Chief Judge has directed that the parties

and counsel be afforded the opportunity to address the matter in a manner that preserves complete confidentiality with respect to any objection raised. Given the imminence of the Markman hearing, a prompt response is required.

If you and your clients wish to waive the judge's disqualification based upon his past and current relationship with Attorney Rowold, letters to that effect from you and from your clients must be electronically sent (e-mail) or faxed by 12:00 p.m. on Tuesday, December 11, 2007 to Chief Deputy Clerk Daniel J. Lynch (e-mail: Daniel\_Lynch@NHD.USCourts.gov or fax to: 603-230-7677). Your communications must **NOT** be sent to the judge, **NOT** filed in the case via ECF, and copies must **NOT** be sent to other counsel.

If all parties and all counsel submit such letters, this Notice and all responses will be made part of the record, as required by Canon 3D, and the judge will continue participation in the proceeding. If a waiver is not received from all parties and all counsel, any responses received will be kept under seal by the clerk and not shown to the judge, nor will the judge be informed of the identity of any party or lawyer who declined to waive the disqualification. If the disqualification is not waived, the case will be reassigned to another judge. No action

will be taken with respect to the trial of this case by the assigned judge until this issue is resolved.

**SO ORDERED.**

/s/ James R. Starr  
James R. Starr, Clerk  
United States District Court

December 10, 2007

cc: All Counsel of Record